



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1994

Mr. Ronnie Jones
Staff Attorney
Legal Services Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR94-735

Dear Mr. Jones:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29821.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information concerning a named waste disposal company (the "company"). You contend that this information may be withheld from public disclosure pursuant to section 552.103(a) of the Government Code. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated in a judicial or quasi-judicial proceeding and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. A governmental entity must meet both prongs of this test for information to be excepted under 552.103(a).

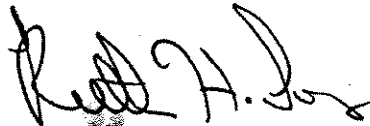
You state that the commission reasonably anticipates litigation involving the company. A governmental entity has the burden of providing information showing why litigation is reasonably anticipated and how the requested records are related to that anticipated litigation. In Open Records Decision No. 452 (1986) at 4, this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may

ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis.
[Citations omitted.]

Since the commission has presented no facts that indicate litigation is reasonably anticipated, it has not met its burden under section 552.103(a). As the commission has not shown the applicability of section 552.103(a), the requested information must be released.¹ We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/KHG/rho

Ref.: ID# 29821

Enclosures: Submitted documents

cc: Ms. Marilyn Hershman
Lawyer's Aid Service
P.O. Box 848
Austin, Texas 78767-0848
(w/o enclosures)

Mr. Burgess Jackson
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)

¹At least part of the information responsive to the request has already been seen by the company. We note that no section 552.103(a) protection generally exists with respect to information once the opposing party or parties to the anticipated litigation have seen or had access to that information. Open Records Decision Nos. 349, 320 (1982). Thus, even if you had shown the applicability of section 552.103(a) you would have had to disclose the information previously seen by the company.